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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

Office Supreme Court, U. S.
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OCT 31 1906
JAMES H. McKENNEY,
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No. 72.

TOMAS GARROZI, JUANA MARIA GONZALES, AND DOMINGO PIAZZA, APPELLANTS,

vs.

JUANA DASTAS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

BRIEF FOR APPELLEE.

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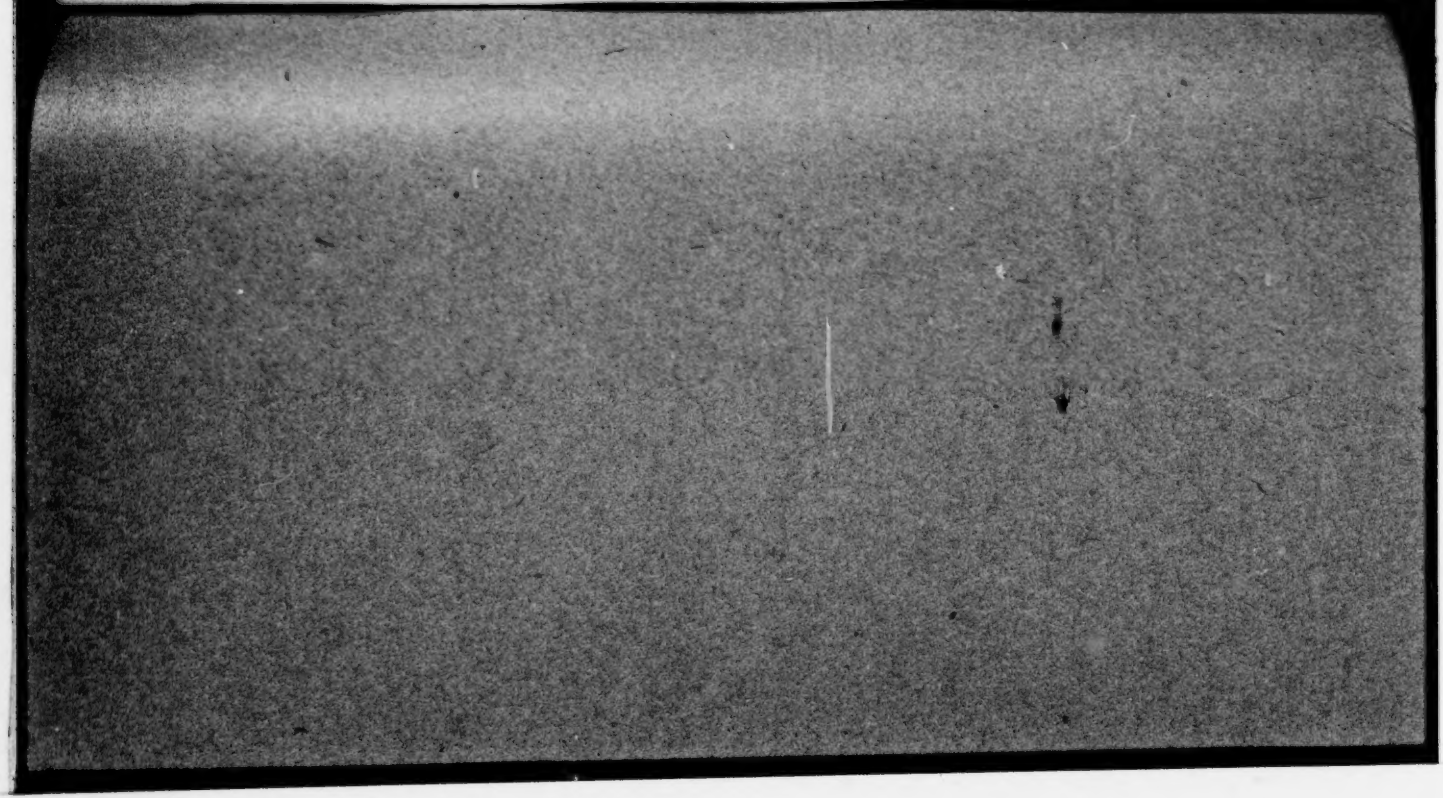

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Preliminary Statement.

Juana Dastas, formerly the wife of appellant Tomas Garrozi, on October 7, 1901, instituted this suit in the District Court of Ponce, Porto Rico, an insular court, against said Garrozi and the remaining appellants for the nullification or rescission of certain contracts of purchase and sale of real estate and mortgage credits. In her statement of the case she asserted that she had contracted a canonical marriage with Garrozi at Yauco, in Porto Rico, on the 12th day of May, 1886, without prior stipulations as to the conditions of the marriage union, and that the spouses lived together until November 28, 1898, when, on account of marital in-

felicities, they became separated in fact without judicial intervention.

That at the time of the separation the spouses possessed certain real properties acquired during the nuptial union, the titles to which were registered in the name of the husband. That in December, 1899, the husband, Garrozi, "began to prepare certain data" for the purpose of bringing a criminal suit on the ground of adultery against the appellee Dastas, and at the same time he transferred, through public instruments, certain of said real estate holdings to his natural sister, Juana Maria Gonzalez, one of the defendants and appellants, "in order to save himself the responsibility which might arise against him from taking such steps." Said criminal suit was instituted in the District Court of Ponce, January 12, 1900, and resulted in a verdict on February 17, 1900, in favor of the accused wife.

That subsequently, through other public instruments, said Garrozi transferred to his uncle Domingo Piazza, the remaining appellant here, other mortgage credits and real titles specified in complainant's statement of case. That, notwithstanding such alienations for professed valuable considerations, the appellant Garrozi continued in the possession, administration, and enjoyment of the property alleged to have been sold, and in order to cover his tracks he obtained from each of the apparent purchasers general powers of attorney which appear in public instruments.

That neither Juana Gonzalez nor Domingo Piazza, who figure as purchasers of said properties, paid the price of such purchases, nor was either of them possessed of any means of subsistence or of any funds or resources other than such as they received from the defendant Garrozi. Said Gonzalez and Piazza were and are insolvent, and the said contracts of purchase and sale were false and simulated.

That on the 21st of May, 1900, Garrozi also in the District Court of Ponce instituted an action for divorce against Dastas on the ground of adultery, and such proceedings were still pending at the time the suit here at bar was com-

menced, although at such date there had been awarded by said District Court to said Dastas certain alimony and legal expenses, none of which had been paid, and, by reason of the transfers above referred to, no property could be found in the name of said Garrozi to satisfy the sums so awarded, wherefore the oratrix prayed the annulment or rescission of the contracts mentioned, and, after referring to pertinent articles of the civil code, asserted her interest in the properties described therein "under the rule of marriage profits," and prayed that she be granted as against Garrozi, as administrator of the marriage union, expense money necessary for the carrying on of the suit (1-8).

Notification to defendant Garrozi of this suit was issued, and the act of conciliation between husband and wife having failed (9), service of notification was "given" to each of the defendants and summons ordered to issue (10).

On January 11, 1902, the defendants appeared by their attorney, Charles M. Boerman, Esquire, and filed a petition for the removal of the cause to the District Court of the United States for the District of Porto Rico, and by order dated January 13, 1902, the cause was removed as prayed (12).

Separate petitions for removal were filed in the name and on behalf of each of the three defendants, appellants here.

In his petition for removal Garrozi asserted that the action then pending in the Insular Court for the District of Porto Rico was within the jurisdictional cognizance of the District Court of the United States, and that the matter in dispute exceeded the sum or value of ten thousand dollars; that Juana Dastas was, "through her marriage, of the nationality of her husband, a citizen of France," and that he (Garrozi), "at the time of the commencement of said suit, has been and still continues to be a citizen of France," and that by reason "of the premises" petitioner is entitled to have said suit re-

moved to the said United States District Court for Porto Rico" (14).

By order of the last-mentioned court this petition was amended by inserting the words "and resident" after the words "a citizen" and before the words "of France," so as to read that petitioner Garrozi, at the time of the commencement of said suit, "has been and still continues to be a citizen *and resident* of France" (18).

The separate petition of defendant Juana Maria Gonzales asserts "that said suit contains controversies which are wholly between the complainant (Dastas), a citizen of France, and your petitioner, who is a citizen of Porto Rico, which can be fully determined between them," and "that the citizenship of the parties is now *as* (and) *has been* (was) at the commencement of this suit as has been stated" (21).

The separate petition of defendant Domingo Piazza asserts that the suit is between "the plaintiff, a French citizen, and the defendants, of whom the petitioner is a citizen of France and a resident of Corsica, France, and has been such at the commencement of the suit as well as now" (22).

The foregoing petitions and various original papers pertaining to the suit having been certified by the presiding judge of the Insular District Court to the United States District Court, and the former court having "inhibited itself from taking any cognizance of said suit in favor of the" latter court (20), the solicitor for the complainant Dastas moved to remand the cause, which motion was opposed by the solicitor for defendants, and was overruled by the court (19).

Thereafter a reformed bill of complaint, which was subsequently amended in various particulars, was filed by Dastas, who now averred that a decree of divorce had been passed in the suit between Garrozi and herself on June 9, 1902. Various pleas and answers of the defendants were filed to the amended bills of complaints, and, the evidence on each side

having been concluded, reference was made to a special master, who in due season filed his report containing findings of fact and law (78). Exceptions to such findings having been overruled, said report was confirmed and a final decree was entered which, among other things, directed a recovery by Dastas against Garrozi "from and by reason of the conjugal society or partnership" of the sum of $13,750.00, said sum being also made a charge and lien against the properties and mortgages thereinafter described. It was also found and decreed that the various transfers and attempted sales complained of in complainant's bill of complaint were "fraudulent, simulated, and void as against complainant," and were made for the purpose "of defrauding complainant in her just demands," and the same were decreed to be "cancelled, set aside, and for naught held," and the properties covered thereby were decreed to be burdened with a lien to the extent of the amounts awarded in favor of complainant Dastas and the special allowances and costs of suit (89-92).

From this decree defendants prayed an appeal to this court (95), and gave an approved supersedeas bond in the sum of $25,000 (105).

SPECIFIC STATEMENT OF AMENDED CASE AND FACTS FOUND.

As finally reformed and amended in the United States District Court for Porto Rico, the bill of complaint took form as follows:

Juana Dastas, claiming to be a citizen of the Republic of France, sued the three defendants above named, all of whom were alleged to be citizens of the Republic of France, residing in the municipality of Yauco, Porto Rico, for the matters hereafter set forth.

Complainant Dastas alleged that on May 12, 1886, with-

out any antenuptial agreement as to the dower and conjugal or community property then had, or which they might thereafter accumulate, she had contracted matrimony with the defendant Garrozi, and sustained the marriage relation with him until November 28, 1898, when they separated; that on June 9, 1902, a decree of divorce was entered dissolving the bonds of matrimony between them, and that on said date complainant was entitled to a one-half interest in certain community property (*bienes gananciales*) particularly described; that on August 9, 1900, the defendant Garrozi "fraudulently and without consideration, and for the purpose of defeating complainant of her rights therein, assigned and transferred" certain mortgage credits, part of said community property, to the defendant Domingo Piazza for a simulated consideration, and said Piazza having brought about the foreclosure of the mortgage subsequently, fraudulently, and in collusion with said Garrozi and the defendant Juana Maria Gonzales, transferred the property covered thereby to said Juana Maria Gonzales, said transfer being wholly without consideration, and as between the parties was for the use and benefit of the defendant Garrozi.

That on December 6, 1899, said Garrozi, as administrator of said community property, fraudulently conveyed and transferred by public instrument, for a simulated consideration, certain other of said community properties, describing them, to said Juana Maria Gonzales; and again, by other notarial or public instruments and by collusive and fraudulent judicial proceedings, said Garrozi, still as administrator of said community property, without consideration and fraudulently transferred other described parcels of said community properties to said defendants Gonzales and Piazza; that each and all of such sales, transfers, and assignments were fraudulent and void, and were in fraud of complainant's rights in said community property; that, apart from said properties and credits, said Garrozi had no means wherewith to settle with complainant for her said interests therein, or to pay to her the alimony *pendente lite* and cer-

tain allowances which had been decreed to her in the course of the divorce proceeding by the District Court of Ponce; and that said false and fraudulent sales, transfers, cessions, and assignments were made for the express purpose of depriving complainant of her lawful rights in said properties and credits, and to avoid the payment of said alimony and allowances.

Wherefore complainant prayed that "said sales, transfers, cessions, and assignments of the aforesaid properties and mortgages be set aside, annulled, and held for naught, and that defendants be required to surrender up the same to be cancelled," and that they be enjoined from claiming any estate, right, title or interest therein, and that "an account be taken of all the foregoing properties and assets, and all other property in which complainant may have an interest; and that a master be appointed to make such accounting and ascertain all the property belonging to the conjugal society and the value thereof, and the parts or portions thereof which correspond to your oratrix," and that the court should "decree a partition and division thereof in the proportion of one-half" to complainant, and should decree her right therein as aforesaid, and for "such further or other relief as the nature of the case may require" (60-65).

To this reformed and amended bill of complaint the three defendants filed a joint and several plea in bar, averring that "on the 9th day of June, 1902, a decree of divorce was granted to the defendant Tomas Garrozi, from and against the complainant Juana Dastas, for cause of adultery on her part," and that therefore she has no claim whatever upon any marriage partnership property or any property in the hands of the defendant at the time of the divorce, under the law of Porto Rico" (65).

By consent of counsel for both parties this plea was referred by the court to a special master "to hear and determine the same, and to report thereon at his earliest con-

venience to the court," and said master subsequently reported "that said plea is insufficient as a defense to said bill, and the same is hereby overruled" (66).

The solicitor for defendants filed an exception to this report of the master, but before the same was brought to the attention of the court (67) he filed a further joint and several plea to the reformed bill of complaint, averring that "under the law of Porto Rico the complainant has no right to ask for the delivery to her of any of the property of the conjugal society, even if there be any, because the complainant has been divorced from the defendant Tomas Garrozi on the statutory ground of adultery on her part, and that, under the law of Porto Rico, her husband, the said defendant, Tomas Garrozi, is to remain the administrator of all property belonging to the wife, even of her separate property, if there be any" (68).

On the same day said solicitor for defendants filed their joint and several answers to the reformed bill of complaint, admitting the marriage of Garrozi to Dastas on May 12, 1886, as averred, and also the divorce on or about June 9, 1902, and alleged that as "such divorce was granted to defendant Tomas Garrozi on the statutory ground of adultery on the part of the complainant," therefore "neither upon said date of the divorce, or at any time thereafter, has complainant been entitled to a one-half interest, or to any interest in any property belonging to the defendant Garrozi, and specifically denied that complainant had any right, title or interest in the properties described in her bill of complaint (69), asserting that at the time of entering into the marriage relation said complainant did not possess nor bring in any marriage property whatever, nor had she after marriage acquired any property, either by gift, donation, purchase or earnings of any kind," and that there never was any marriage community property in existence, upon which complainant had any claim whatever, and, further, that at

the time of the divorce the property possessed by said Tomas Garrozi was in value less than the property which he had brought into the marriage, and "that there was no income or increase whatever which could have formed a part of a community property" (70).

Defendants denied fraudulent intent, combination or collusion in connection with the sales, transfers, cessions, and assignments complained of, and asserted that the titles to certain of said properties had been acquired by the defendant Juana Maria Gonzalez "for a valuable consideration during the years 1899 and 1900, and that others of those mentioned" belong to and had been acquired by said defendant Piazza during said years, and that all of said transactions were in good faith and for a valuable consideration (70).

It was also averred that the sales by Garrozi of said properties to both Gonzales and Piazza were made before any alimony *pendente lite* was granted to complainant by the District Court of Ponce and before any costs were given to her in said suit, and that there was therefore no credit whatever in her favor at the time of such conveyances which could have been prejudiced thereby, and that said complainant Dastas had no share or interest whatever in any of said properties at the time of such transfers or sales (71).

The solicitor for complainant moved on various appropriate grounds to strike defendants' pleas and amended answer from the files (73), and the pending motions having been brought to the attention of the court, "all of the foregoing motions, exceptions, and pleadings" were referred to the special master "to take such action thereupon as may be proper in accordance with equity and the practice thereof" (74).

Said matters having come on for hearing before said special master in accordance with the terms of the reference, defendants, with consent of complainant's solicitor, withdraw their plea filed November 3, 1904 (68), as a plea, and

pray that same may be allowed to stand as part of their answer, and it is so ordered, and complainant's motion to strike defendants' answer from the files was denied, and the special master so reported to the court (75).

This report of the special master was confirmed by the court, as was also the former report of said special master overruling defendants' plea first filed (65, 66), and thereupon, by leave of the court complainant filed the general replication, and the cause, being thus at issue, was by the court referred to the special master to be proceeded in "with as much diligence as possible" (76), and to report to the court findings of fact and conclusions of law upon the testimony submitted in behalf of the parties" (78).

The special master having on April 8, 1905, filed his report containing both findings of fact and conclusions of law (78-85), and the exceptions of both complainant and defendants thereto (85, 86) having been overruled by the court, said report of the special master was approved (89), and it was by the court adjudged and decreed that there is due to complainant Dastas from defendant Garrozi, "by reason of the conjugal society or partnership existing between" them during the existence of their marriage from May 12, 1886, to June 9, 1902, the date of the divorce, the sum of $13,750.00, which sum is a lien upon the properties described in the decree; that the transfers and attempted sales of the properties described in the decree are fraudulent, simulated, and void as against the complainant, and were made for the purpose of defrauding her in her just demands; that said properties and mortgage credits now really belong to the defendant Garrozi, subject to the payment to complainant of said sum of $13,750.00 and such other costs and expenses as may be allowed by the court; that all of said conveyances and assignments be and are hereby cancelled, set aside, and for naught held, and said defendant Garrozi is declared to be the true owner thereof, subject to complainant's rights therein, and that said sum of $13,750.00, with

interest at 6 per centum from July 9, 1902, together with the sum of certain specified allowances to the special master and the special examiner, amounting in all to $900.00, and costs of suit be paid by said defendant Garrozi, for which sums complainant is awarded execution (89-92).

Subsequently, on motion of complainant a supplemental order or decree was entered by the court whereby the defendant Garrozi was further ordered to pay to complainant and her solicitor the amounts awarded to her in the course of the divorce proceedings by the District Court of Ponce, for costs and alimony, with interest, and $1,500.00 counsel fees, on account of legal services rendered in this cause (93).

The errors assigned by appellees in support of their appeal are fifty-six (56) in number, and will be found at pages 95 to 104, inclusive, of the printed transcript of the record.

The United States District Court for Porto Rico, as required by the United States statutes governing appeals from that court (sec. 35, Act April 12, 1900), made a statement of facts and announced conclusions of law and certain rulings on the admission or rejection of evidence and exceptions thereto, which will be found *in extenso* at pages 108 to 123, inclusive, of the transcript of record. The facts found by the court, which are of particular consequence on this appeal, are the following:

Findings 1 and 2. The facts as to the marriage and divorce of Dastas and Garrozi, as set forth in the bill of complaint and the answer thereto (108).

Findings 3 and 4. That at the time of her marriage Dastas was about fifteen years old; had been a servant in the house of Garrozi, and brought no property whatever to the marital partnership; that Garrozi, who was then 46 years old and was the owner of the various properties referred to in the bill of complaint (109).

Findings 5 to 21 concerned matters of administration of the community property during the continuance of the conjugal partnership, and particularly the pretended sales and transfers of the real properties and mortgage credits complained of in the bill of complaint (109-112); and, in so far as the defendants Gonzales and Piazza were concerned, said sales and transfers were found to have been made without consideration and fraudulently, for the purpose of defrauding complainant of her interest therein (112).

Finding 26. That the total amount or value of the assets brought by defendant Garrozi to the marital partnership was $71,500.00; and (Finding 27) that at the time of the dissolution of said marital partnership said Garrozi was possessed of property of the value of $77,000.00.

Finding 24. That during the continuance of the marital partnership defendant made several trips to Europe, and spent by reason thereof $47,000; that defendant's claim that these trips and the consequent expenditure of such large sums of money were made necessary by reason of his serious and continued illness, was not substantiated by other credible witnesses; that defendant either exaggerated the amounts expended or that such expenditures were neither necessary or reasonable, and hence not a proper charge against the property of the marital partnership, and that the sum of $25,000 would have been a liberal expenditure under the circumstances for a man in Garrozi's condition of life, and that therefore $22,000 of the total charge of $47,000 should be charged against Garrozi's separate property (113).

The difference of $5,500 under finding 26, and $22,000 under finding 24, composing a total of $27,500, constituted the "profits" of the conjugal partnership, one-half of which, viz., $13,750, formed the principal item which was decreed to be paid by Garrozi to complainant Dastas.

JURISDICTION.

It has not been suggested that the District Court of Ponce, Porto Rico, whence this cause was removed into the United States District Court for the District of Porto Rico, did not have original jurisdiction of the controversy. In view of the fact that at least three out of the four persons, parties to the cause, are admittedly citizens of the Republic of France, can it be doubted that the United States District Court for the District of Porto Rico also had original jurisdiction of the controversy concurrent with the Insular District Court?

Act of March 2, 1901, sec. 3, 31 Stats. L., 953.

Ortega *vs.* Lara, 202 U. S., 339, 344.

As the amount of the judgment appealed from, exclusive of interest and costs, exceeds $5,000, it is certain that this Court has jurisdiction to entertain this appeal.

Act of March 3, 1885, 23 Stats. L., 443, ch. 355, sec. 1.

Act of April 12, 1900, 31 Stats. L., 85, ch. 191, sec. 35.

Royal Ins. Co. *vs.* Martin, 192 U. S., 150.

If, then, no objection was taken in the trial court to any supposed want of jurisdiction on the part of that court to entertain the cause by reason either of its subject-matter or the character of the parties or for irregularities in procedure, it would seem that it would be too late to take such objection in this court for the first time.

It is quite true, as argued on the brief for appellants (pp. 15-18), that on every writ of error or appeal pending before this honorable tribunal

> "the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even

> when not otherwise suggested and without respect to the relation of the parties to it" (Mansfield, &c., Ry. Co. *vs.* Swan, 111 U. S., 379).

And so, in cases of which the inferior Federal Courts may take cognizance only by reason of the citizenship of the parties, this court of its own motion, or at the suggestion of counsel if seasonably made, will dismiss the writ of error or appeal where the record does not affirmatively show jurisdiction in the court below, for in such cases this court can have no jurisdiction of the cause except to reverse the judgment or decree of the lower court on that ground.

> Jackson *vs.* Ashton, 8 Peters, 148.
> Bors *vs.* Preston, 111 U. S., 407.

But both the *rationale* and the practice is otherwise where, as here, the jurisdiction of both the lower court and of this court on appeal is beyond doubt on the score of both subject-matter and parties, and criticism is solely directed to a supposed irregularity in the method of procedure occurring either in the invocation of the judicial power or in the course of the trial of the cause.

In such cases this court will not reverse unless timely objection thereto was taken by the party improperly affected thereby, and in none of such cases will a reversal ensue where it appears that the party complaining of the irregularity himself brought it about.

The present case was removed from the Insular Court, which had jurisdiction over it, to the Federal District Court, which also had concurrent jurisdiction to entertain it, at the sole instance of the same solicitor for appellants who now asserts that such removal was improper and affords ground for reversing the decree which the tribunal of his own choice rendered against him.

A motion to remand the cause to the Insular Court seasonably interposed by the solicitor for appellee was strenously and successfully opposed by the same solicitor for appellants.

That the right of removal from the Insular Courts of Porto Rico to the Federal District Court for that district in certain cases has existed since the establishment of the latter Court cannot be doubted.

Act of April 12, 1900, 31 Stats. L., 77, ch. 191, sec. 34.

Whether the present case was of the class contemplated by the removal statute need not be considered, for, it appearing that the lower court had jurisdiction of the cause by reason of the fact that one or more of the parties to the controversy were citizens or subjects of a State foreign to both Porto Rico and the United States, the party who, over the objection of his adversary, successfully invoked that jurisdiction will not now be heard to complain of the exercise.

As was said by this Court in the case of *Cowley vs. Northern Pacific R. R. Co.*, 159 U. S. 569, 583:

> "The case having been removed to the Circuit Court upon petition of defendant, it does not lie in its mouth to claim that such court had no jurisdiction of the case, unless the court from which it was removed had no jurisdiction."

Counsel for appellants concede (Brief, p. 21) that "it appears from the complaint filed in the Insular District Court, and especially from the petition of removal by Juana Maria Gonzalez, the complainant in this case, at the time of the filing and commencement of the suit was an alien, and so were two of the defendants," and he bases his objection to the jurisdiction of the District Court of Porto Rico solely upon the ground that "the third defendant, to wit, Juana Maria Gonzalez, was a citizen and a resident of Porto Rico (Brief of App'ts, p. 22). But, in order that the United States District Court for the district of Porto Rico may entertain jurisdiction of a cause, it is not at all necessary that all of the parties to the controversy should be citizens or sub-

jects of a foreign State or States. It is sufficient if the parties *or either of them* possess such character.

MERITS.

The discussion of the merits of the cause in this brief will follow the order adopted in appellant's brief, and for convenience of reference the points herein discussed will be similarly numbered, beginning with the

THIRD POINT.

While it may be conceded that under the law of Porto Rico a married woman, so long as the marriage relation continues and has not been terminated by divorce or death, has no right to demand the liquidation of the conjugal partnership, that principle has no application here. It is true that at the date of the institution of this suit in the District Court of Ponce, and indeed at the time of its removal into the United States District Court, the decree of divorce between complainant Dastas and defendant Garrozi had not been passed; nevertheless such decree had been passed and had become effective, and the marriage between the parties had been terminated thereby, long before the pleadings in this case had reached a final issue.

The fact of the dissolution of the marriage relation between the parties mentioned constituted an important allegation in complainant's reformed bill of complaint, which was filed with the permission of the court and with the acquiescence of the solicitor for defendants, and the same fact was affirmatively set up by way of defense in the pleas and answers of the defendants to complainant's amended bill of complaint (R., 60, 61, 68, 69).

The method pursued by the solicitors for the respective parties to the cause in bringing about the filing of these amended pleadings is interesting, and consideration thereof

would seemingly put an end to appellants' objection under this point.

As originally instituted the suit had for its principal object the cancellation and annulment of certain sales, assignments, or transfers of real property and mortgage credits which complainant asserted belonged to the conjugal partnership, the alleged collusive transfers of which were in fraud of her rights. The plea of defendants raised issues pertinent to such object only. With respect to such issues depositions were taken, and it was developed thereby that during the pendency of the case the complainant Dastas and the defendant Garrozi had been divorced by a decree of the Supreme Court of Porto Rico on the ground of the former's adultery. Thereupon the solicitor for complainant moved the trial court for leave to amend the bill of complaint in various particulars, among others, by striking out the second paragraph thereof and substituting in its place and stead the following averment:

> "Your oratrix represents that on the 9th day of June, 1902, a decree of divorce was entered dissolving the bonds of matrimony between her and defendant Thomas Garrozi, that upon said date your oratrix was entitled to a one-half interest of the following community property (bienes ginanciales) hereinafter set forth as well as in all other community property and assets of every kind and description" (51).

By agreement of the parties the motion filed by complainant for leave to amend her bill of complaint as aforesaid was referred to a special master to examine and report "as to whether the amendments proposed by complainant are made as to the matters of form or whether such amendments constitute a departure or substantial change of the cause of action of complainant" (55). The special master, having considered the matter, reported that certain amendments, among which was included the one last above quoted, "con-

tain matters affecting the substantial rights of the respective parties in that said amendments enlarge the amount revocable by the complainant if her theory of the law of the case should be sustained by the court; but that the same are consistent with and germane to the case of the plaintiff as made upon the issues already joined, and do not constitute a departure therefrom; said changes being devised to make the allegations of the bill conform to the details of the proof as taken before the examiner" (56). To this finding and report of the special master the defendants did not file any exceptions, and the matter having been brought to the attention of the court on a motion by complainant for leave to amend her bill of complaint in the particulars specified, and both parties being represented by their respective solicitors in open court, it was "ordered that the report of the special master be confirmed in so far as it recommends the allowance of amendments numbers one" (above quoted), etc., and complainant was given until the following rule day to file her amended bill of complaint (59). To the action of the court in thus allowing an amended bill of complaint to be filed the defendants did not except, and after said amended bill of complaint, which, among other things, contained the above quoted amendment and prayed that "an account be taken of all the foregoing properties and assets and all other property in which complainant may have an interest; that a master be appointed to take such accounting and ascertain all the property belonging to the conjugal society and the value thereof, and the parts or portions thereof which correspond to your oratrix * * * and shall declare by its decree the right of your oratrix as aforesaid in and to the same" (65), had been filed, the defendants, without reserving objection, filed appropriate pleas and an answer thereto, and complainant having filed the general replication to the joint and several answer of the defendants (76), the cause was by consent of counsel "submitted to the special master for final decree" (77) upon the amended pleadings.

The defendants not having preserved of record their objections, if any they had, to the action of the trial court in permitting the bill of complaint to be so amended, and having themselves affirmatively pleaded the divorce in question as a bar to complainant's right of recovery, and having specifically denied that complainant had any right, title, or interest in the properties described "in the amended bill of complaint," and having submitted the issues so framed to the trial court for its decision, and that court having finally decided the same by entering a final decree in the cause, it was then and is now too late to raise the objection that the particular matters complained of should have been made known to the court through the medium of a supplemental bill of complaint rather than by amendments to the original bill.

By the concurrent action of the respective parties the cause in the Federal court was made to assume a new and different aspect and became in effect if not in fact a new suit.

FOURTH POINT.

UNDER THE LAWS IN FORCE IN PORTO RICO ON JUNE 9, 1902, THE DIVORCED WIFE WAS ENTITLED TO HER PROPORTIONATE SHARE OF THE BIENES GANANCIALES NOTWITHSTANDING THE DECREE OF DIVORCE WAS FOUNDED UPON HER ADULTERY.

The Civil Code of Porto Rico, which became effective October, 1889 (War Department Translation), under the sub-head of "Contracts relating to property by reason of marriage," provides as follows:

> "Art. 1315. Persons who may be joined in matrimony may, before celebrating it, execute contracts, stipulating the conditions for the conjugal partnership with regard to present and future property, with-

out any other limitations than those mentioned in this code.

"In the absence of contracts relating to property, it shall be understood that the marriage has been contracted under the system of legal conjugal partnership."

It is found as a fact in this case that the marriage was celebrated between the parties without the execution of any prior contracts (Finding 1, p. 108).

Articles 1392 to 1395, inclusive, under the heading "Conjugal partnership—general provisions," are as follows:

"Art. 1392. By virtue of the conjugal partnership the earnings or profits indiscriminately obtained by either of the spouses during the marriage shall belong to the husband and the wife, share and share alike, upon the dissolution of the marriage.

"Art. 1393. The conjugal partnership shall always begin on the same day that the marriage is celebrated. Any stipulation to the contrary shall be void.

"Art. 1394. This partnership cannot be renounced during the marriage, except in case of judicial separation.

"When the renunciation *should* take place by reason of a separation, or after the marriage has been dissolved or annulled, said renunciation shall be included in a public instrument, and the creditors shall have the right granted them in article 1001.

"Art. 1395. The conjugal partnership shall be governed by the rules of articles of partnership in all that does not conflict with the express provisions of this chapter."

Articles 1401 and 1407, under the sub-heading "Property of the conjugal partnership," are as follows:

"Art. 1401. To the conjugal partnership belong:

"1. Property acquired for a valuable consideration during the marriage at the expense of the partnership property, whether the acquisition is made for the partnership or for one of the spouses only.

"2. That obtained by the industry, salaries, or work of the spouses or of either of them.

"3. The fruits, income, or interest collected or accrued during the marriage, coming from the partnership property, or from that which belongs to either one of the spouses.

"Art. 1407. All the property of the marriage shall be considered as partnership property until it is proven that it belongs exclusively to the husband or to the wife."

Article 1408, under the sub-heading "Charges and obligations of the conjugal partnership," is as follows:

"The conjugal partnership shall be liable for:

"1. All the debts and obligations contracted during the marriage by the husband, and also for those contracted by the wife in the cases in which she can legally bind the partnership.

"2. The arrears or interest, matured during the marriage, of obligations which affect the private property of the spouses as well as the partnership property.

"3. The minor repairs or of mere preservation, made during the marriage, to the private property of the husband or the wife. Extensive repairs shall not be chargeable to the partnership.

"4. Extensive or minor repairs to the property of the partnership.

"5. The support of the family and the education of the children in common, and of the legitimate children of one of the spouses only."

Articles 1412 to 1414, under the sub-heading "Administration of the conjugal partnership," are as follows:

"Art. 1412. The husband is the administrator of the conjugal partnership, with the exception of what is prescribed in article 59.

"Art. 1413. Besides the powers the husband has as administrator, he may alienate and encumber for a valuable consideration the property of the conjugal partnership without the consent of the wife.

"Nevertheless, every alienation or agreement which

the husband may make with regard to said property in contravention of this code or in fraud of the wife shall not prejudice her nor her heirs.

"Art. 1414. The husband may dispose by will of his half of the property of the conjugal partnership only."

Article 1417, under the sub-heading "Dissolution of the conjugal partnership," is as follows:

"The conjugal partnership expires on the dissolution of the marriage or when it is declared void.

"The spouse who, by reason of his or her bad faith, caused the annulment, shall not receive any share of the property of the partnership.

"The conjugal partnership shall also terminate in the cases mentioned in article 1433."

And articles 1433, 1434, 1435, and 1439, under the sub-heading "Separation of the property of the spouses and its administration by the wife during marriage," are as follows:

"Art. 1433. The husband and the wife may request the separation of the property, and it shall be decreed, whenever the spouse of the plaintiff should have been condemned to a penalty which includes civil interdiction, or should have been declared an absentee, or should have given cause for divorce.

"In order that the separation may be decreed, it shall be sufficient to present the final judgment rendered against the guilty or absent spouse in each one of the three cases above mentioned.

"Art. 1434. After the separation of property has been ordered the conjugal partnership shall be dissolved, and its liquidation shall be made according to the provisions of this code.

"Nevertheless, the husband and the wife shall mutually attend to their support during the separation, and to the support of the children, as well as to their education, each one in proportion to his or her respective means.

"Art. 1435. The power to administer the property

of the marriage granted to the husband by this code shall continue in force if the separation should have been granted at his instance; but, in such case, the wife shall not have any right to the subsequent profits of the partnership, and the rights and obligations of the husband shall be governed by the provisions of sections second and third, chapter third of this title.

"Art. 1439. If the separation should cease by reconciliation, in cases of divorce, or because in the other cases the causes have disappeared, the property of the marriage shall again be governed by the same rules as before the separation, without prejudice to what may have been legally done during the same.

"At the time of reunion the spouses shall specify in a public instrument the property which they bring anew, and said property shall be that forming the private estate of each one of them respectively.

"In the case mentioned in this article, all said property shall always be considered as new property brought to the marriage, even though it be the same, either partially or wholly, which existed before the liquidation made by reason of the separation."

The provisions of said Civil Code declaring the "Effects of annulment of marriage and of divorce" are as follows:

"Art. 67. The civil effects of suits and decrees concerning annulment of marriage and divorce can only be obtained before the ordinary tribunals.

"Art. 72. The final decree of annulment shall produce, with regard to the property of the marriage, the same effects as a dissolution by death; but the spouse who has acted in bad faith shall have no rights to the profits of the conjugal partnership.

"Art. 73. A decree of divorce shall produce the following effects:

"1. The separation of the spouses.

"2. The children to remain or be placed under the authority and protection of the innocent spouse.

"When both are guilty, a guardian shall be provided for the children in accordance with the provisions of this code, and if the decree has not pro-

vided otherwise, the mother in every case shall have the children under three years of age in her charge.

"Upon the death of the innocent spouse, the guilty one shall recover the parental authority and his or her rights, when the cause which gave rise to the divorce should have been adultery, violence to the person, or grave insult. When the cause is different, a guardian shall be appointed for the children. The deprivation of the parental authority and of its rights does not exempt the guilty spouse from the fulfillment of the obligations which this code imposes upon him or her with regard to the children.

"3. The guilty spouse shall lose all that may have been given or promised him or her by the innocent one or by any other person in consideration for the latter; and the innocent spouse shall keep all that he or she has received from the guilty one, being permitted, besides, to claim forthwith all that may have been promised by the same.

"4. The separation of the property of the conjugal partnership, and the loss of the administration of that of the wife, if the husband should have it, and is the one who gave cause for the divorce.

"5. The retention by the innocent husband of the administration, if he should have it, of the property of the wife, who shall only be entitled to support."

The Spanish law, including the Civil Code above referred to, made a sharp distinction between an "annulment of marriage" (Nulidad del matrimonio) and a divorce, and while the final decree of annulment is declared to produce with regard to the property of the marriage "the same effects as a dissolution by death" (article 72), it is expressly declared (article 104) that "Divorce only produces the suspension of the life in common of the spouses," and that (article 73, sec. 2, par. 3) "upon the death of the innocent spouse, the guilty one shall recover the parental authority and his or her rights, when the cause which gave rise to the divorce should have been adultery."

Article 1429 of the Civil Code of 1899 declares that—

> "When the conjugal partnership is dissolved by the annulment of the marriage, the provisions of articles 1373, 1378, 1417, and 1440 shall be observed; and should it be dissolved by reason of the separation of the property of the spouses the provisions of chapter sixth of this title shall be observed." (See articles 1433 *et seq., ante.*)

Assuming for the purpose of argument that the above quoted provisions of the Civil Code of 1899 were in force and governed the relations of the spouses from and after the passing of the decree of divorce on June 9, 1902, it does not at all follow therefrom that the guilty wife, in case of divorce for her adultery, thereby forfeited her rights in the *bienes gananciales* or her power to enforce the same. It is true that in such case she would forfeit "all that may have been given or promised * * * her by the innocent one (spouse) or by any other person in consideration for the latter," but this refers only to voluntary gifts as between the spouses and does not refer to *bienes gananciales.*

It is expressly provided by article 73 of the Civil Code, so greatly relied upon by appellants, that—

> "A decree of divorce produces the following effects:
> "1. The separation of the spouses.
> * * * * * *
> "4. The separation of the property of the conjugal partnership and the loss of the administration of that of the wife, if the husband should have it and is the one who gave cause for a divorce.
> "5. The retention by the innocent husband of the administration if he should have it, of the property of the wife, who shall only be entitled to support."

The clauses relating to the continued administration by the innocent wife or husband, as the case may be, in the foregoing relate only to the administration of the separate

estates of the respective spouses and do not at all refer to "the property of the conjugal partnership."

Articles 72 and 1417 of this Civil Code do not apply in this case, as they clearly refer to actions for the annulment of the marriage on the grounds set forth in title IV, chapter 3, section 3, of said code.

While it may be conceded that by the laws of Spain in force anterior to October, 1889 (Las Partidas), a divorce on the ground of adultery of the wife operated to deprive her of her interests in the *bienes gananciales,* the Civil Codes greatly mitigated the rigor of this rule, and it has been held by the Supreme Court of Madrid (Sentencia of May 30, 1901) that after dissolution of the conjugal partnership by divorce or death the *bienes gananciales* cannot be disposed of by the surviving spouse until a liquidation of the conjugal partnership shall first have taken place.

It is suggested with deference, that the learned commentator Mucius Scaevola, in his commentaries upon the above point, does not sustain the contention of appellants. A full translation of the matters appearing in his commentaries on the Civil Code, volume 22, pages 374 and 375, referred to on page 30 of appellants' brief, is as follows:

> "*Divorce.*—The few ancient authors who examine this point do it lightly, stating only that the communion between the consorts will not take place when the divorce has been caused by the guilt of the wife, because there is lacking then the reason of the law which grants the communion for the sake of the mutual interests of the two consorts.
>
> "The code contradicts itself in its articles 73 and 1433 as to the effects of the divorce upon the conjugal property, because the former establishes of course as a consequence of the sentence the separation of the shares in the conjugal property and the loss of the administration of that of the wife if it was in the possession of the husband and the latter was the offender, adding that the innocent husband would keep the administration of the share of the

wife in the conjugal property, while in the article 1433 it is discretionary with the innocent consort the division of the property, expressly soliciting it from the court, and only as a consequence of this petition the conjugal property is dissolved, according to the article 1433.

"The opposition between these two articles, is, notwithstanding, more apparent than real, because they coincide in substance, the only difference existing in the necessity that the division of property should be requested by the innocent consort in order that, as a consequence, the community property should be dissolved.

"The fact is that the divorce declared by final judgment produces the cessation of the legal partnership, without prejudice that if the husband is the innocent consort he has, according to said article 1433, the power of administering the conjugal property and of receiving all the profits, without any deduction than the necessary amount for the wife's alimony."

And on pages 376 and 377 of the same volume, the learned commentator, under the heading of "Adultery," says:

"All these laws from whose differences of form great difficulties may be encountered are without value even to the substance thereof considering the juridical status of the code, which does not distinguish adultery, in so far as its civil effects are concerned, from the other causes which gave rise to divorce. Adultery by itself, even since it has been made the subject of criminal punishment, will not produce the consequences of terminating '*los gananciales*,' which can only be brought about when a civil sentence of divorce accords, as above stated, the separation of *los bienes*."

So it appears that the effect of the divorce for the adultery of the wife is simply to stop the further participation of the wife in the future conjugal profits which may be earned by the husband and gives rise to the obligation of separating the

interest of the husband and wife in the community property, as provided in article 73 of that code.

It is conceded that under the provisions of section 3 of article 73 the divorced wife in such case forfeits "all that may have been given or promised her by" the innocent husband, but *bienes gananciales* are not gifts. They constitute whatever may have been acquired during the existence of the marriage relation on the theory of profits resulting from joint labors.

Escriche, volume 2, page 86, defines *bienes gananciales* and the dominion of the respective spouses thereover as follows:

> *"Conjugal Property.*—That acquired through a common title, lucrative or onerous, by the husband and wife, during the marriage and while they live together, or that acquired by the husband and wife, or either of them, during the marriage or while living together, by purchase or through their work or industry, as well as the products of their separate property brought by each of them and that acquired by each of them by some lucrative title during the existence of the conjugal partnership.
>
> "Everything acquired by the husband and wife is common property to both. 'Everything gained or bought by the husband and wife, while living together, according to ley 1, tit. 3, lib. 3 del Fuero Real (Royal Franchise) is owned by both in common.'
>
> "Though the husband may have more property than the wife, or the wife more property than the husband, either real or personal property, according to law 3, d. tit. y lib., the products are common property to both of them. Laws 1 & 3, tit. 4, lib. 10, Nov. Recop."
>
> "Husband and wife have the dominion of the conjugal property: Laws 1 and 4, tit. 4, lib. 10, Nov. Recop.; with the difference that the husband possesses it by right of possession and by right of disposition, and the wife only possesses it by right of possession, acquiring the right of disposition when the matrimony is dissolved. For this reason the wife cannot give or sell said property during the matri-

monial relation, but the husband may, without the consent of the wife, dispose of the property in favor of living persons and even make moderate gifts for just causes; but excessive and capricious gifts are null, as well as alienations made with the object of defrauding the wife, who in this case shall have the right of action against the property of the husband and against the holder of the things alienated.

"The conjugal property belongs in common to husband and wife, and they possess or own it by halves, although the husband may have more separate property than the wife, or the wife more than the husband, although either of them may acquire afterwards more property than the other, and in short, although the property may be acquired through business or work by one of them only; because in virtue of the matrimonial relation it is established between the two consorts a legal partnership, different from any other, by which they mutually exchange their acquisitions. Laws 1, 2, 3, 4 & 5, tit. 4, lib. 10, Nov. Recop."

And Scaevola in his commentaries (volume 2, p. 213) upon section 3 of article 73 of the code, limits the forfeitures therein provided for to gifts (donaciones)—*e. g.*:

"Nearly all the references made relate exclusively to adultery, which was the principal reason accepted by the ancient legislation for divorce. The guilty party was punished thereby, specially the wife, with the forfeiture of all properties or part thereof. *The new laws are more liberal, in the determination of the causes for divorce as well as in its consequence.*

"In general the effects of the decree of divorce are the same as those of the complaint, with a more definite nature. It is clearly expressed by No. 1 of this section, stating as first effect the separation of the parties."

* * * * * * *

"The guilty party loses, according to the provisions of number three, all those things given to him by the innocent party or by him promised, or by any person

in consideration of the innocent one; and on the contrary the innocent preserves all that which he has received from the guilty one, having besides the right to claim all promises made by the guilty to him. It is not necessary to say anything regarding gifts or promises when these are made by any one but the husband or wife, but when by either of them, it must be taken into consideration that it is necessary to have legal capacity to acquire. Now, the second subdivision of section 50 provides (referring to marriages made against the provisions of section 45) that none of the parties can receive from the other anything by way of gift or legacy, except the exceptions therein named, so that in this kind of marriage the guilty party will not lose any gift made to him or what has been promised to him, and the innocent one will not be able to keep that what he has received from the guilty nor could he make or enforce any promise because the parties, as provided in said number 2, section 50, cannot receive anything the one from the other by way of gift or legacy."

This view and the contentions of the appellee with respect to the right of the wife, although laboring under the disability of a sentence of divorce on the ground of adultery, to bring about a dissolution of the conjugal partnership and the judicial ascertainment of her interest in the *bienes gananciales*, is strengthened by the provisions of the Civil Code of Porto Rico approved March 1, 1902, and still in force. It is by the provisions of that code which was in force on June 9, 1902, the date of the divorce, that the rights of the principal parties to this controversy are to be made.

While many sections and provisions of the codes of 1889 and 1902 are not only similar but identical, the provisions of the latter code (title IV, chapter 5), under the subheading of the "Effects of divorce," differ materially from the provisions of article 73 of the code of 1889, as will readily appear from the following:

"SEC. 173. A divorce carries with it a complete dissolution of all matrimonial ties, and the division of

all property and effects between the parties to the marriage.

"SEC. 174. The party against whom the judgment is rendered shall forfeit to the party obtaining the divorce all gifts which the other party may have conferred upon such party during the marriage, or when the same was contracted, and the innocent party shall retain everything which has been acquired from the other."

Sections 1, 2, 4, and 5 of article 73 of the Code of 1889, except in so far as above appears, have no counterpart in the provisions of the Civil Code of 1902. The Code of 1902, among other things, pertaining to "The rights and duties between married persons," provides as follows:

"SEC. 159. The husband shall be the administrator of the conjugal property, except when stipulated otherwise. * * * Nevertheless the real property belonging to the conjugal community may not be alienated or burdened, such a transaction being null except when effected with the mutual consent of both parties to the marriage.

"SEC. 160. Each one of the parties to a marriage is the owner and administrator of his own property.

"SEC. 161. The husband is the legal representative of the conjugal community.

"The wife may contract, and appear in court, in all cases referring to the defense of her own rights and property, to the discharge of the *patria potestas*, guardianship or administration conferred on her by the law, and the exercise of a profession, employment or occupation."

"SEC. 163. Marriage is dissolved in the following cases:

"(1) By the death of the husband or wife;

"(2) By divorce legally obtained;

"(3) If the marriage be declared null.

"SEC. 164. The causes for divorce are as follows:

"(1) Adultery on the part of either of the parties to the marriage."

The effects of a divorce, as declared by this Code (1902), have been above set forth (secs. 173-174).

The provisions of the Code of 1902 relating to property rights "By reason of marriage" correspond to the similar provisions in the Code of 1889, as follows:

Section 1282 of the Code of 1902 is identical with article 1315 of the Code of 1889 (*ante*).

Sections 1310 to 1313, inclusive, of the Code of 1902 relating to "Conjugal partnerships, general provisions," are identical with articles 1392 to 1395, inclusive, of the Code of 1889 (*ante*).

Sections 1316 and 1322 of the Code of 1902, relating to "Property of the conjugal partnership," are identical with articles 1401 and 1407 of the Code of 1889 (*ante*).

Sections 1327 and 1328 of the Code of 1902, relating to the "Administration of the conjugal partnership," differ somewhat from articles 1412 and 1413 of the Code of 1889 on the same subject, the former sections reading as follows:

> "SEC. 1327. The husband is the administrator of the conjugal partnership, with the exception of what is prescribed in sections 81 and 82 of chapter 6, title V of Book First of this Code."
>
> (MEM.—This reference is seemingly incorrect.)
>
> "SEC. 1328. Notwithstanding the power which the husband has as administrator, he shall not have the power to give, to sell and to bind for a consideration the real estate of the conjugal partnership without the express consent of the wife.
>
> "Every sale or agreement which the husband may make in respect to the said property in violation of this section and the other provisions of this code, or in fraud of the wife, shall be null and shall not prejudice his or her heirs."

Section 1330 of the Code of 1902, on the "Dissolution of the Conjugal partnership," corresponds in all respects with article 1417 of the Code of 1889 (*ante*).

Section 1331 of the Code of 1902, on the "Liquidation of the property of the conjugal partnership," provides that—

> "Upon the dissolution of the partnership an inventory shall immediately be made;" * * *
>
> "SEC. 1332. The inventory shall include specifically for the purpose of collating them the sums which having been paid by the conjugal partnership are to be deducted from the capital of the husband or of the wife.
>
> "The amount of the gifts and alienations which must be considered illegal or fraudulent, in accordance with section 1328, shall also be brought to collation."
>
> "SEC. 1334. After the debts, charges, and obligations of the partnership have been paid, the capital of the husband and of the wife shall be liquidated and paid, in so far as the inventoried estate may reach, making the proper deductions according to the rules which are elsewhere prescribed (*in*) with regard to dowry.
>
> "SEC. 1335. After the deductions from the inventoried estate specified in the preceding section have been made, the remainder of the same estate shall constitute the assets of the conjugal partnership.
>
> "SEC. 1337. The net remainder of the partnership property shall be divided, share and share alike, between the husband and wife, or their respective heirs.
>
> "SEC. 1342. In the absence of a specific declaration of the marriage contract, the separation of the property of the spouses during the marriage shall not take place except by virtue of a judicial decree."

Sections 1343 and 1344 of the Code of 1902 are identical with articles 1433 and 1434 of the Code of 1889 (*ante*), but articles 1435, 1436, and 1437 of the Code of 1889 (*ante*), continuing in force the right of administration by the husband over the marriage property after a divorce had been granted at his instance, find no counterpart whatever in the Code of 1902.

So it would seem that, irrespective of what may have been the effect of a divorce because of fault on the part of the wife, under the *Partidas*, or even under the more enlightened rule of the Civil Code of 1889, it is certain that the Code of 1902, which must be given controlling effect in the present case, gives no indication of an intention to impose any forfeiture whatever upon the divorced wife, except in so far as pure gifts received by her during the marriage or on account of it, may be concerned. The provisions for the dissolution of the conjugal partnership declare specifically that after all proper deductions from the inventoried estate shall have been made "the net remainder of the partnership property *shall be divided share and share alike* between the husband and wife or their respective heirs," and this would seem to end all controversy as to whether the divorced wife can maintain an action like the present. It cannot be assumed that the Legislative Assembly of Porto Rico, after declaring the rights of the spouses in the net remainder of the conjugal property with such particularity, intended to leave the matter without any provision for the enforcement of such rights. Section 1342 of the Code of 1902 undoubtedly contemplates an application to a court of competent jurisdiction for the purpose of bringing about a separation of the conjugal property, and it cannot be that the right of either spouse to compel such a separation upon the lines prescribed should depend upon the assent or joint application of the other.

FIFTH POINT.

It is conceded that under the letter of the Civil Code of 1889 and of 1902 the husband is the administrator of the conjugal partnership, and that dispositions of the assets of the partnership made by him *in good faith* cannot be questioned by the wife, but it is expressly provided by the code of 1889 (section 1413) that—

"Every alienation or agreement which the husband may make with regard to said property in contravention of this Code *or in fraud of the wife shall not prejudice her nor her heirs.*"

Section 1414 of that Code permits the husband to dispose of "his half of the conjugal partnership only" by will.

Section 159 of the Code of 1902 likewise declares that the husband shall be the administrator of the conjugal property "except when stipulated otherwise," but it also expressly declares that the real property belonging to the conjugal community shall "not be alienated or burdened" except with the consent of the wife; and this prohibition is repeated and emphasized in section 1328.

It is objected by appellants under this point that the trial court erred in refusing to allow the appellant Garrozi in his accounts some $22,000 alleged by him to have been necessarily spent in the course of several visits to Europe, one-half of such sum, viz., $11,000, being awarded to appellee as a part of the conjugal profits.

The trial court found as a fact (finding 24, p. 112) that Garrozi made several trips to Europe during the continuance of the marital partnership, "and spent large sums of money by reason thereof, as near as can be determined from his testimony, the following amounts;" aggregating in all $47,000; and "that such extravagant expenditures were not either necessary or reasonable, and hence not a proper charge against the property of the marital partnership."

The court further found "that twenty-five thousand dollars ($25,000) would have been a liberal expenditure under the circumstances for a man in defendant Garrozi's condition of life," and concluded that $22,000 of the amount of $47,000 should be charged against his separate property (113).

In support of their objections and contentions under this point, appellants quote largely from Ballinger on Community Property and Scaevola's Commentaries on the Code.

We have no quarrel with either of these authorities, nor with the quotations therefrom made by solicitors for appellants, for in each there is distinctly recognized the principle upon which the judgment of the trial court in disallowing the claimed credit of $22,000 rests.

Ballinger, while declaring the husband to be "the active partner or sole business agent of the marital establishment," possessed of "the exclusive administration of all the ganancial property," with power to "hypothecate or alienate it, untrammeled by any authority existing in the wife," says also that "the only restriction upon his power of disposition, or even of dissipating it, was *that* the alienation must not be made maliciously *or in fraudulent diminution of the gananciας*. The law in making the rights of the wife as to administration passive merely, presupposes the capacity and prudence of the husband as its active agent, and at the same time is designed to preserve domestic harmony" (Appellants' Main Brief, p. 35).

And so Scaevola, after observing that even on the dissolution of the marriage "no charges ought to be made against the husband, in any case, of the infinity of small expenses even made at his simple caprice, *provided they were of the current and natural order in the administration which any person of average diligence would make*" (Appellants' Brief, p. 36), and that the power of administration of the marriage community properly conferred upon the husband is more ample than any other administration admitted by the Code, concludes significantly as follows:

> "As long as he does not forget to decorously maintain the family and to attend to the necessary repairs of the property in the terms established by article 1408, and as long as he does not alienate the community property or its fruits fraudulently against the interest of the wife, according to the disposition of article 1413, the powers of the husband are nothing less than absolute. Article 1412 does not say where there is the limit of the power of the husband, in refer-

> ence to the administration. But the disposition of article 1413 is general as to administration and to alienation, and, its doctrine may be reduced to one general principle; the husband may do everything that he pleases, alienating, incumbering and simply managing the community property and its profits, as long as his acts are not inspired by the intent to defraud his wife" (Appellant's Brief, p. 37).

It is apparent that the court below was of opinion that the ascertained extravagances of Gorrozi in connection with his European excursions amounted to a "fraudulent diminution of the gananciás," an alienation "fraudulently against the interest of the wife," at least to the extent of $22,000, and hence the refusal to allow the husband such sum in his account and the direction to make it a charge against his separate estate.

SIXTH POINT.

This point would seem to be sufficiently answered by referring to sections 1332 to 1337, inclusive, of the Civil Code of 1902, which provide for the "Liquidation of the property of the conjugal partnership" and the division of the net remainder, "share and share alike, between the husband and wife, or their respective heirs."

In the present case full liquidation was had by a judicial proceeding involving an inventory and accounting, in the course of which the husband had the fullest opportunity of presenting and establishing every credit to which he felt himself entitled.

SEVENTH POINT.

While the action of the trial court in making the allowances complained of by appellant under this point may be open to question, it would seem to be both just and equitable, for if the conduct of the husband in maliciously or fraudu-

lently diminishing the ganancias against the interest of the wife compelled her to litigate to protect her rights, it would seem to be but fair to make her some allowance on account of expenses necessarily incurred in the course of the litigation.

While costs in actions at law are governed by fixed and arbitrary rules, in equity the award or denial of costs is always in the discretion of the court (Riddle *vs.* Mandeville, 6 Cranch, 86), and courts of chancery in general follow the rule of the civil law, *victus victori in expensis condemnatus est*, and they decree the payment of costs by the unsuccessful to the successful party.

The provision of U. S. Revised Statutes, section 824, declaring that "on a final hearing in equity" a docket fee of $20 may be allowed to the solicitor of the prevailing party is not necessarily exclusive of other allowance by the court—*e. g.*, in cases of costs paid out of a fund in court.

Trustees *vs.* Greenough, 105 U. S., 527.
Central R. R. Co. *vs.* Pettus, 113 U. S., 116.

The allowance of counsel fees in the present case had no relation to legal services rendered in the divorce proceeding, but related solely to services rendered in the equity court in the wife's attempt to conserve the conjugal assets and to procure their liquidation pursuant to law. It was through her efforts and such services that the fraudulent transfers were set aside and the property taken into the possession of the court by the appointment of a receiver.

Under the authority of the two cases last above cited, the action of the trial court in this particular also should be sustained and affirmed.

EIGHTH POINT.

Appellants' objection under this point is without merit. There is no room here for any argument based upon a supposed presumption of fraud.

The trial court found a series of facts (findings 5 to 21, inclusive) concerning the alienation of the properties and mortgage credits specified by complainant Dastas and found by the court to be community property, and, based upon such facts, the court further found—

> "that all the foregoing transfers described in findings numbered 16, 17, 18, 19, and 20 were made by the parties thereto, (viz., the appellant Garrozi and one or other of the other appellants in each instance) without consideration, with knowledge of whatever rights the complainant (Dastas) may be found to have in said properties as community property of the said marital partnership, *and for the fraudulent purpose of defrauding said complainant out of whatever share she might have in said properties*" (112).

NINTH POINT.

The errors assigned under this objection and the exceptions to the rulings of the court upon which such assigned errors rest are too numerous to permit of their discussion *seriatim* in this brief.

In the absence of the full evidence, it cannot be reasonably judged whether the appellants were in fact prejudiced by any of the matters complained of, for in no instance is it stated that the evidence either admitted or rejected over appellants' objection was the only evidence on the contested point.

Many of appellants' objections will not stand the test of criticism, for example, number 1, on page 114 of the record. There the question was clearly objectionable by reason of

its form, being an assertion by counsel which the witness was possibly expected to confirm, although the exception contains no statement to that effect; and so with objection number 2, the bearing of which upon the evidence generally or upon the findings of fact is not shown by the context, and, so far as this record is concerned, the question covered by objection numbered 3 would appear to have been utterly immaterial.

The trial court had before it the entire evidence adduced in the cause, and was the better able to judge of the value and effect of the matters objected to.

Upon the whole case, it is respectfully submitted that the judgment of the district court of the United States for the district of Porto Rico should be affirmed.

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